

NTSB Order No.  
EM-26

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 30th day of August 1972.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

BERTHALL L. WINBORNE, Appellant.

Docket ME-27

OPINION AND ORDER

The appellant, Berthall L. Winborne, appearing pro se, has appealed from the decision of the Commandant sustaining the revocation of his merchant mariner's document (No. Z-273796-D3) for misconduct.<sup>1</sup> His offenses involved derelictions from duty while employed as a boatswain on the SS HALCYON TIGER, a merchant vessel of the United States, which was engaged on a voyage to the Far East.<sup>2</sup>

Appellant's prior appeal to the Commandant (Appeal No. 1869) was from the initial decision of Coast Guard Examiner Tilden H. Edwards.<sup>3</sup> This decision was rendered after the examiner had conducted the evidentiary stage of appellant's hearing in absentia<sup>4</sup>

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<sup>1</sup>The revocation action was taken pursuant to 46 U.S.C. 239(g) and is appealable to this Board under 49 U.S.C. 1654(b)(2). Rules of procedure for the conduct of such appeals to the Board are set forth in 14 CFR 425.

<sup>2</sup>The record indicates that appellant signed the shipping articles at San Francisco on July 21, 1970, and the vessel departed that date.

<sup>3</sup>Copies of the decisions of the Commandant and the examiner are attached hereto.

<sup>4</sup>46 CFR 137.20-25(a) of the Coast Guard's hearing regulations provides that: "In any case in which the person charged, after being duly served with the original of the notice of the time and place of the hearing and the charges and

Misconduct was established by means of four logbook entries made by the master of the HALCYON TIGER in the course of the voyage. In accordance with the facts reflected therein, the examiner found that appellant had failed to perform his duties on three separate dates in August 1970, at ports of call in Vietnam and the Philippines; and had failed to join the vessel at San Diego, California, on September 19, 1970, for the last leg of the return voyage to San Francisco. Appellant's disciplinary record of six prior sanctions for similar offenses since 1951 was then submitted, from which the examiner found that this was his "fourth sequence of offenses in three years." He thereupon imposed revocation, concluding that such repeated acts of misconduct called for that sanction as an "average order" under applicable regulations.<sup>5</sup>

In his brief on appeal, appellant claims to have been employed aboard the SS MANKATO VICTORY, trading in the Far East, at the time evidence was received, contending that he was thus unfairly deprived of a chance to defend himself. He also attempts to discredit the log entries and challenges the accuracy of two notations on his disciplinary record. Counsel for the Commandant has filed a brief in opposition.<sup>6</sup>

Appellant has not, in our view, offered a satisfactory explanation for his nonappearance. He requested and received a continuance of the hearing from the examiner on October 15, 1970, for the stated purpose of making one additional voyage so that he might earn enough to cover counsel fees. From past experience, he estimated that at least 2 months would be needed to complete the contemplated voyage. The examiner was persuaded to continue the hearing to January 11, 1971, with the understanding that appellant "should keep in touch with the Coast Guard as to [his] whereabouts,

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specifications, fails to appear at the time and place specified for the hearing, a notation to that effect shall be made in the record and the hearing may then be conducted 'in absentia'.

<sup>5</sup>46 CFR 137.20-165 contains a table of disciplinary sanctions deemed appropriate as average orders for various types of offenses committed by seamen "for the information and guidance of examiners." The examiner herein applied the criteria for revocation set forth in Group A(2) of the table.

<sup>6</sup>The inaccuracies are conceded with respect to the compiled disciplinary record submitted to the examiner, but the Commandant offers supplementary records to correct them and to show that they are mere clerical mistakes.

or if...on a ship."<sup>7</sup> He failed to appear on that date, and, in his continuing absence, the examiner proceeded with the hearing on January 19, after noting on the record that no contact had been received from appellant and ascertaining that appellant had not retained counsel as expected.<sup>8</sup>

According to the appellant, his voyage on the MANKATO VICTORY was from December 7, 1970, to February 28, 1971. His statements of record give us a high degree of certainty that he realized in starting such a voyage that it would extend well beyond the remaining 4 weeks of his allotted time. Yet, he makes no claim to have communicated with the Coast Guard, as the examiner had instructed, until he reached Japan. In the meantime, he told his wife to notify the Coast Guard that he was at sea if he should receive a notice to appear. He concedes that neither of his methods was successful, since a notice was not sent to his home address and the Coast Guard advised him that no letter was received.

Appellant's clear obligation, which he took no step to fulfill, was to seek a further continuance prior to this voyage when he foresaw the necessity. Further notice to him was not required, since the date on which his hearing was scheduled to resume was settled and certain. The record shows that there was no confusion on this score, and the conclusion is inescapable that appellant made a deliberate choice to disregard the examiner's authority in the adjudicative process. Under these circumstances, we fully agree with the Commandant's decision, that there "is no basis for a finding that he was denied the opportunity to enter a defense...."

With respect to the log entries, appellant asserts that in two of those which reflected his failure to perform duties, his reply was recorded as "No," whereas he had actually given more lengthy replies such as are stated in his brief. We find that he adds nothing to the contents of one of the entries and provides what we would classify as a "lame excuse" for the other (viz., that the launch to his vessel left shore ahead of schedule). Further assertions that the log entry of appellant's failure to join was not read to him and that he was not furnished a copy of the entry are also unfounded, since these elements are required only "if [the

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<sup>7</sup>Tr. 11.

<sup>8</sup>Tr. 15.

offender] is still in the vessel."<sup>9</sup> Other assertions by appellant warrant no consideration as matters raised for the first time on appeal.<sup>10</sup>

Upon review, appellant's showing is inadequate to rebut the log entries or the manner in which they were executed. We hold that they were made in substantial compliance with law and serve as prima facie proof of the acts of misconduct which they reflect. Since these official records are not rebutted, we conclude that the examiner's findings concerning appellant's offenses are supported by reliable, probative, and substantial evidence.

The disciplinary record of appellant is corrected by reciting herein that his admonition on April 22, 1951, took place in Trieste, Italy, rather than in New York; and his admonition on March 15, 1963, was for offenses aboard the SS ROBIN KIRK, rather than on the SS ROBIN CREEK.<sup>11</sup> The examiner properly regarded these prior sanctions as remote and limited his consideration, in assessing sanction, to those offenses which began with appellant's 6-month suspension for failure to join the SS PENNMAR, on August 2, 1967.

This 3-year pattern of violation evinces appellant's incorrigible tendency to shirk his duties and jump ship at his whim. Thus, he continues to break rules of shipboard discipline deemed essential to the safe and expeditious operation of merchant vessels and has made himself a liability, insofar as these interests are concerned, aboard any vessel on which he might serve. We find that his misconduct herein and prior violations provide ample justification for the revocation action taken.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it is hereby denied; and
2. The orders of the Commandant and the examiner revoking appellant's seaman's documents be and they are hereby affirmed.

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<sup>9</sup>46 U.S.C. 702.

<sup>10</sup>Examples are appellant's attempts to characterize the master as "log happy," and as prejudiced because of appellant's union activities.

<sup>11</sup>There is no question, however, that the substance of appellant's prior misconduct in these instances was correctly stated by the examiner.

REED, Chairman, McADAMS, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order. THAYER, Member, was absent,not voting.

(SEAL)